

SERVED: June 21, 1994

NTSB Order No. EA-4195

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 8th day of June, 1994

	)	
Petition of	)	
	)	
DON BATES	)	
	)	
for review of the denial by	)	Docket SM-4080
the Administrator of the	)	
Federal Aviation Administration	)	
of the issuance of an airman	)	
medical certificate.	)	
	)	

**OPINION AND ORDER**

The Administrator has appealed the oral initial decision of Administrative Law Judge William R. Mullins, issued January 11, 1994.<sup>1</sup> Petitioner, who has represented himself throughout this proceeding, did not reply. The law judge granted petitioner's request that the Administrator be directed to issue him a medical certificate. We deny the Administrator's appeal.

On October 15, 1991, petitioner applied for a first-class

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<sup>1</sup>A copy of the law judge's decision, an excerpt from the hearing transcript, is attached.

airman medical certificate. The designated medical examiner withheld issuance of the certificate, pending further evaluation.

Petitioner was told, by letter of May 10, 1993, that the sought certificate would not be issued to him. That letter cited two reasons for denial. The Administrator believed that petitioner was an alcoholic.<sup>2</sup> The Administrator also believed that petitioner suffered from secondary cognitive deficit as a result of his alcohol abuse. (That allegation, and any suggestion that petitioner had any organic brain dysfunction, was withdrawn at the hearing. Tr. at 5.)

The burden is on petitioner to demonstrate his entitlement to a certificate. In other words, he must prove the Administrator wrong in his conclusion that petitioner is not medically qualified because of alcoholism. On review of the record, we think that petitioner satisfactorily met that burden.

Certain facts of petitioner's history appear to have initiated the Administrator's belief that petitioner had a history of alcohol abuse and had not satisfactorily conquered the

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<sup>2</sup>In denying the first-class medical certificate for this reason, the FAA cited 14 C.F.R. 67.13(d)(1)(i)(c), 67.15(d)(1)(i)(c), and 67.17(d)(1)(i)(c), all of which read that an applicant may not have an established medical history or clinical diagnosis of:

Alcoholism, unless there is established clinical evidence, satisfactory to the Federal Air Surgeon, of recovery, including sustained total abstinence from alcohol for not less than the preceding 2 years. As used in this section, *alcoholism* means a condition in which a person's intake of alcohol is great enough to damage physical health or personal or social functioning, or when alcohol has become a prerequisite to normal functioning.

problem:

1. Petitioner was convicted in 1984 of driving while intoxicated (DWI).

2. In 1986, petitioner's medical application indicated that he had broken a hand.

3. In July 1991, on the third day following vascular bypass surgery, petitioner experienced delirium tremens (DTs), and also while still in the hospital, had an atrial fibrillation attack.

Dr. Barton Pakull, the FAA's Chief Psychiatrist and the Administrator's only witness, testified to his belief that petitioner's post-op DTs could have been caused by nothing except alcohol withdrawal and were, therefore, conclusive and absolute proof of alcoholism. Tr. at 118-119. In addition, Dr. Pakull knew that, in 1993, petitioner attended a substantial number of Alcoholics Anonymous meetings, not all of his medical applications referred to his DWI, and he may not have reported, when undergoing psychological evaluation in connection with the FAA's denial of his certificate, either his 1984 DWI or medical advice that he refrain from alcohol.

Dr. Pakull, who did not personally evaluate or observe petitioner, also interpreted other information he had received in a way that supported his view that petitioner was an alcoholic:

There appears to be a lot of disparate evidence that Mr. Bates has an alcoholism problem. Apparently, he and his wife gave such information to the surgeon that would have indicated an alcoholism problem, and he, in fact, did have withdrawal symptoms. He was told not to drink after his atrial fibrillation attack, which could have been precipitated by heavy drinking, and yet he continues to drink. We also wonder about the episode of breaking his hand and whether this was related to a [sic] drinking as well. His one DWI conviction in 1986 [sic] assumes greater significance in the light of his history.

Exhibit A-1 at 45.<sup>3</sup>

Petitioner introduced information at the hearing that convinced the law judge that Dr. Pakull's inferences were mistaken. We find no fault with the law judge's conclusion that petitioner has presented sufficient information to counter the Administrator's conclusion that petitioner was an alcoholic.

Petitioner admitted that he had used alcohol socially prior to mid-1991, but denied he was or had been an alcoholic. He explained, among other things, his AA attendance (one confirmation, in Dr. Pakull's view, of petitioner's alcoholism).

Petitioner testified that he had gone to the recommended series of AA meetings to accompany a family member and also as a learning experience -- to examine his own history. He was reported to have stated (a report that is unrebutted) that he was advised that "he did not fit the mold." Tr. at 147 and Exhibit A-1 at 14.<sup>4</sup>

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<sup>3</sup>At the hearing, Dr. Pakull acknowledged his belief (contrary to the above-quoted statement from his report) that petitioner had abstained from alcohol for 2 and 1/2 years (since his 1991 surgery). Nevertheless, he testified, because respondent did not admit that he was an alcoholic and did not participate in a treatment program such as Alcoholics Anonymous (AA), 2 and 1/2 years of abstinence is not sufficient to satisfy Dr. Pakull that petitioner is no longer an alcoholic. The law judge was concerned with this view. Our analysis, *infra*, does not require that we address petitioner's "recovery," and therefore we need not decide whether we agree or disagree with Dr. Pakull on its adequacy.

<sup>4</sup>Petitioner also explained, contrary to the Administrator's allegation, that he had completed the alcohol related course required in conjunction with his DWI conviction. The law judge agreed, as a finding of fact, and the Administrator did not take exception to that ruling. Tr. at 148.

Petitioner offered an excerpt from the New Harvard Guide to Psychiatry, to show that his DTs could have been surgery-related.

Exhibit P-17.<sup>5</sup> The law judge specifically discussed the New Harvard Guide's analysis of DTs as a possible complication after surgery, and the agreement of petitioner's family doctor and vascular surgeon that a cause of them other than alcohol withdrawal was very possible.

Moreover, looking at the above-quoted excerpt from Dr. Pakull's report, we find many assumptions that are disputed in the record. First, there is no indication, contrary to Dr. Pakull's supposition, that either petitioner or his wife indicated an alcoholism problem to the vascular surgeon, Dr. Carr. Petitioner demonstrated that pre- and post-operation advice from his doctors was related to smoking and diet as well as alcohol. Second, even if petitioner was warned because the doctors knew he drank more than occasionally -- and this is not established -- petitioner has shown that there is no reliable evidence that these doctors warned petitioner about drinking because they knew or thought he was an alcoholic. Petitioner introduced a December 13, 1993 letter from Dr. Jordan, his family practice doctor of a number of years (Exhibit P-14), stating the opposite ("I had no knowledge or information regarding Mr. Bates

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<sup>5</sup>The Administrator urges us either to strike this exhibit for petitioner's failure to produce it in discovery or to allow introduction of some additional related material from that publication. We grant the latter request and accept the offered material, but it does not, especially in light of the physicians' letters (see infra), affect our conclusion.

that he was misusing alcohol") and a January 4, 1993 letter from Dr. Carr to the same effect (Exhibit P-5).<sup>6</sup> We, therefore, see no basis in any of these reports for Dr. Pakull's conclusion that petitioner told his doctors or that his doctors otherwise knew that he abused alcohol. Even more important, the FAA's conclusion that the DTs were conclusive proof of alcoholism also is disputed by both doctors. See footnote 6.

Third, Dr. Pakull's report assumes that the post-op atrial fibrillation attack was caused by alcohol, but there is no grounds for that conclusion other than that it is one possibility. Petitioner cannot prove some other cause, as a medical matter, and that Dr. Pickens (who treated him for the

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<sup>6</sup>Dr. Carr's 1991 hospital discharge summary (Exhibit A-1 at 100) notes that petitioner had had a history of "ethanol ingestion" (not "abuse," as the Administrator claims). However, Dr. Carr's letter states, "He did have a history of alcohol use but he denies a history of alcohol abuse or dependence and he does not feel the DT's were due to alcohol. This event could have been due to other causes rather than alcohol and I don't feel the diagnosis of alcoholism should be established on this one event alone."

The Administrator argues that the law judge erred in admitting Exhibits P-15 and P-5 (Jordan letter of 6/16/93 concerning the post-op episode of DTs, stating that "It was never established that this [the episode of DTs] was due to alcoholism and could easily have been the consequence of medication administered to him while he was in the hospital"). The Administrator reasons that these letters should be excluded because petitioner did not provide them during discovery. We disagree for much the same reason as we denied the Administrator's request regarding the Harvard Guide. Not only did the law judge not abuse his discretion in handling petitioner's pro se presentation flexibly, the Administrator had ample opportunity to consult with these doctors on the matters that were the subject of these letters. Moreover, contrary to the Administrator's claim, petitioner executed a release directed to Dr. Jordan.

atrial fibrillation) had also told him to avoid alcohol is merely consistent with the possibility that the atrial fibrillation can be caused by drinking. It does not prove that was the cause.<sup>7</sup>

There also is other evidence that the FAA discounted that we think undermines Dr. Pakull's conclusions. Dr. Pakull admitted at the hearing that petitioner's blood alcohol level on the DWI conviction was measured at .12, which he testified was a relatively low amount, indicative of nothing. And, most significantly in our view, the psychiatric evaluations on which Dr. Pakull relied offer no support to his alcoholism theory. Dr. Spenser, who performed two evaluations and testing, concluded that, although one [of many] tests showed some difficulty handling new information, a common deficit in alcoholics, he emphasized that this score was only one piece of data and there was no pattern of other information supporting a conclusion that petitioner was an alcoholic. Exhibit A-1 at 15-16.<sup>8</sup>

The regulation contemplates that a denial of a certificate be based on a medical history or clinical diagnosis of

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<sup>7</sup>Dr. Pickens wrote two letters on petitioner's behalf. The first incorrectly described the relationship between the atrial fibrillation attack and petitioner's hospitalization and contained the sentence: "He was advised to eat normally and to avoid alcohol." His second letter corrected the first point and omitted the cited sentence, stating that the first letter was incorrect. We will not assume, as the FAA apparently would, that Dr. Pickens would omit this sentence even though he believed petitioner had a drinking problem.

<sup>8</sup>Dr. Gill, another psychiatrist on whom Dr. Pakull relied, states his discomfort in performing an evaluation without additional tests, without interviewing petitioner's wife, and with only one interview with petitioner.

alcoholism. As far as the record indicates, no physician who has seen petitioner has diagnosed him as an alcoholic. Dr. Pakull relied on second and third-hand information, not a clinical diagnosis in our view.<sup>9</sup> And, for the reasons already discussed, we are persuaded that, if the assorted facts and opinions offered by the Administrator constitute legitimate medical history,<sup>10</sup> they do not constitute sufficient medical history.

Section 67.13 et al., moreover, requires a showing of "a condition in which a person's intake of alcohol is great enough to damage physical health or personal or social functioning, or when alcohol has become a prerequisite to normal functioning." The FAA never made such a showing here: there is no proof of

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<sup>9</sup>Dr. Pakull's referral letter to Dr. Gill stated "The previous evaluation was useless since he did not tell them he was being seen because of an alcoholism problem." Exhibit A-1 at 43.

Not only does this lead Dr. Gill to assume the truth of the "problem," we must note that it would be difficult for petitioner to tell an evaluator the reason for the visit other than it was required by the FAA, when the FAA did not tell petitioner of the source of its concern until much later. It is perhaps because of Dr. Pakull's interpretation, passed to Drs. Gill and Spenser, that they speak of petitioner's alcohol "problem" and his having "minimized" an alcohol problem. Dr. Gill only seemed concerned because of petitioner's apparent "denial" and his failure to report various historical details the doctor considered relevant.

We cannot fairly rely here on petitioner's reporting failure and will not draw adverse conclusions from it. Petitioner cannot be expected to know the aspects of his history in which the doctors are interested. Petitioner did fail to report his 1983 DWI conviction when he answered, in 1993, probably hundreds of questions on various forms given him by these doctors. See Tr. at 95. He also did not report that, in connection with his 1991 surgery, he was advised not to drink at all, and had followed that advice. There is no evidence, however, that respondent intentionally omitted these facts, and given the entire record, these omissions are inadequate to support a finding that respondent is an alcoholic.

<sup>10</sup>See McCarthy v. Administrator, 3 NTSB 1761 (1979).

organic damage, and the other physical evidence is equivocal.

Nor is there **any** evidence that alcohol has affected petitioner's social or personal functioning. In prior cases, we have looked closely at all aspects of a petitioner's life, as alcoholism will usually make itself apparent. In Carroll v. Administrator, 6 NTSB 1170, 1176 (1989), in rejecting the Administrator's claims of alcoholism, we made an important distinction between drinking and alcoholism. We stated:

[T]he record demonstrates that respondent drinks alcohol, on a regular basis, that on at least one occasion, in 1982, he drank to excess, and that his wife, who is a teetotaler, believes he drinks too much. While the information, at most, may raise an inference of an alcohol problem, it must be weighed against the facts that respondent has been steadily employed since at least 1960 in a high visibility job that requires motor skills, that he has never been medically treated for alcohol abuse and that, when tested by physicians, he shows no physical nor mental abnormalities, i.e., organic brain disease, loss of motor skills.

In McCarthy, supra at 1763, we again recognized that alcoholism would be expected to result in an inability to function in "business, family life, and other basic life situations." See also Journic v. Administrator, 3 NTSB 4009, 4011 (1981) ("there is no evidence in the record to conclude that petitioner's drinking habits . . . damaged his physical health, person or social functioning, or that he experienced symptoms of addiction").

There is no such evidence here. Before the denial of medical certification at issue here, petitioner had been employed for 23 years as a professional helicopter pilot, a highly visible

position, and prior to that had served in the military for 8 years. See Carroll, supra. The Administrator had no evidence of marital or work-related problems. There was no evidence of alcoholic pattern. There was no indication that petitioner had been impaired by alcoholic intake or that alcohol was necessary to his normal functioning. And one DWI is not, in our view, proof of social dysfunction.<sup>11</sup> For all of these reasons, we will sustain the law judge's reversal of the Administrator's denial of a medical certificate.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The New Harvard Guide to Psychiatry attachments to the Administrator's appeal are accepted into the record;
2. The Administrator's appeal is denied;
3. The initial decision is affirmed; and
4. The Administrator shall issue petitioner a first-class medical certificate within 30 days, provided he is otherwise and fully qualified.

VOGT, Chairman, HALL, Vice Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

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<sup>11</sup>See McCarthy, supra (five DWI convictions "are evidence that alcohol has indeed affected his social functioning, [but] they alone are not sufficient to constitute a medical history or clinical diagnosis of alcoholism").